No. 82-341

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

VS.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Interstate Commerce Commission err in vacating its previous orders condemning unduly prejudicial export grain rates to Corpus Christi, Texas, and prescribing non-prejudicial rates on that traffic by adopting a new test of what constitutes control of joint rates and a new policy of refusing to prescribe nondiscriminatory rates except in instances where such rates are also in violation of other provisions of the Interstate Commerce Act?

2. Can the Interstate Commerce Commission, by purporting to adopt a new test for what constitutes control of joint rates, actually make an interpretation of the Interstate Commerce Act which nullifies that Act's prohibition against unreasonable rate discrimination in situations where the origin carrier and the delivering carrier are unable, or unwilling, to agree on how to divide the revenues produced by the joint rates?

3. Did the Court of Appeals for the Fifth Circuit err (1) in holding the issues raised by three petitions for review of decisions by the Interstate Commerce Commission were moot and, (2) after so holding, dismissing those petitions rather than remanding the proceedings to the Interstate Commerce Commission with instructions to dismiss?

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IN THE

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OCTOBER TERM, 1982

No.

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Nueces County Navigation District No. 1, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in these proceedings which were there designated as Nos. 78-1348, 79-1816, 80-1842 and 80-1843, but decided on a consolidated basis.[1]

[1]In the Court of Appeals, Producers Grain Corporation was a petitioner but subsequently sold its grain elevator in Corpus Christi, Texas, and is not a petitioner here. The other parties in the court below were (a) the respondents, Interstate Commerce Commission and United States of America; (b) Bunge Corporation and Louis Dreyfus Corporation, intervenors in support of petitioners; and, (c) Missouri Pacific Railroad Company, Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., and Houston Port Bureau, Inc., intervenors in support of respondents.

OPINION BELOW

The opinion of the Court of Appeals is reported as *Nueces County Nav. Dist. No. 1 v. I.C.C.*, 674 F.2d 1055 (1982). A copy of the slip opinion is Appendix A.[2] Several decisions were issued by the Interstate Commerce Commission ("the Commission" or the "I.C.C.") in its Docket No. 36491 (Sub-No. 1). The first is reported as *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, 357 I.C.C. 382 (1977). A copy of that decision is Appendix B. The second decision was styled the same, and is reported at 359 I.C.C. 592 (1979). A copy of that decision is Appendix C. The last was part of a consolidated decision in three cases. It is reported as *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 364 I.C.C. 269 (1980). A copy of that decision is Appendix D.

The other cases dealt with in the consolidated decision were the Commission's Docket Nos. 31098 and 33447. The previously entered orders in those dockets were vacated. Docket 31098 was decided as *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954). The order entered in that case is Appendix E. Docket 33447 was decided as *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961). The order entered in that case is Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1982. A petition for rehearing was denied June 1, 1982 (Appendix G). This petition for certiorari was timely filed within 90 days of that date, pursuant to Rule 20 of

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[2]The appendices are separately bound in a companion volume cited as "Pet. App.____".

this Court. The jurisdiction of the Court is invoked under Title 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Several sections of the Interstate Commerce Act (formerly 49 U.S.C. 1, et seq; now 49 U.S.C. 10101, et seq) are involved. While these proceedings were being considered by the I.C.C., Congress recodified the Act with no intention to change it. As the I.C.C. and the Court of Appeals have referred to sections of the Act as they read both prior and subsequent to the recodification, Appendix H reproduces certain sections as they formerly were, and now are. They were formerly designated as 49 U.S.C. 3(1), 49 U.S.C. 12(1)(a), and 49 U.S.C. 15(1), but are now 49 U.S.C. 10741(b), 49 U.S.C. 10321(a), and 49 U.S.C. 10704(a)(1), respectively.

STATEMENT OF FACTS

The origin of these proceedings dates back a number of years. In 1954, the I.C.C. issued its decision in Docket No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954). It held the export grain rates from points in ten midwestern states to Corpus Christi, Texas, were, and for the future would be, unduly prejudicial to Corpus Christi and unduly preferential to Galveston and Houston, Texas, "to the extent that the rates to Corpus Christi exceed those to Galveston and Houston" (291 I.C.C. 470).

The defendant railroads[3] had contended that they did

[3]The defendants in Docket 31098 were all of the railroads serving either (a) origin stations in the ten states, (b) Corpus Christi, or (c) the alleged preferred ports, including St. Louis-San Francisco Railway Company (Frisco), now merged into Burlington Northern, Inc.

not have "effective control" of the involved rates, but the Commission expressly held (291 I.C.C. 470):

> The *evidence clearly shows* that the Missouri Pacific Lines and the Texas & New Orleans[4], together with the other carriers which serve the Texas ports, acting in conjunction with the originating lines in this origin territory, *directly and effectively control the rates* to all such ports. (Emphasis supplied).

The order entered in Docket 31098 is Appendix E (Pet. App. 110a) By it the railroads were "required to establish, on or before April 29, 1954, . . . and thereafter to maintain and apply" rates to Corpus Christi that do not exceed the rates to Galveston and Houston.

In 1961, the I.C.C. issued its decision in its Docket 33447, *Nueces County Nav. Dist. No. 1 v. Atchison T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961). It held the export grain rates from points in Oklahoma, eastern New Mexico and northern Texas to Corpus Christi were, "and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, and Port Arthur to the extent that the rates to Corpus Christi exceed the corresponding rates to Galveston, Houston, and Port Arthur". (315 I.C.C. 163).[5]

There, also, it was contended there was no basis for a finding of preference and prejudice because "no one carrier, or group of carriers, effectively controls the rates to

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[4]Texas & New Orleans was a wholly owned subsidiary of Southern Pacific Transportation Company which was later merged into the parent.

[5]Even though a large number of railroads, including the Frisco, were named as defendants, only three, not including the Frisco, tried to uphold the lawfulness of the assailed rates. (315 I.C.C. 156).

Corpus Christi and the other allegedly preferred ports", but the I.C.C. disagreed and held (315 I.C.C. 162):

> The Missouri Pacific and the Texas & New Orleans serve the Texas ports, including Corpus Christi, and those carriers and the other defendants, acting in conjunction with the originating lines, directly and effectively control the rates from Oklahoma, northern Texas, and eastern New Mexico to all of the considered ports.

The order entered in Docket 33447 is Appendix F (Pet. App. 112a). It required the railroads "to establish, on or before February 20, 1962, . . . and thereafter maintain rates . . , which will prevent and avoid the prejudice and preference found" in the report to exist.[6]

The railroads complied with the orders in Dockets 31098 and 33447 and established export grain rates to Corpus Christi at the identical level as the rates from the same origins to Galveston and Houston. Later efforts to "unequalize" those grain rates were condemned by the I.C.C.. *Export Grain From Texas to Texas Points,* 319 I.C.C. 16 (1963).

However, in 1970, a bare majority of the I.C.C. started trying to ignore the holdings and orders in Dockets 31098 and 33447 and allowing some railroads to reduce grain rates to Galveston and Houston without doing the same to

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[6]The holdings on control of rates and the orders in Dockets 31098 and 33447 were consistent with both earlier and later I.C.C. decisions relating to Corpus Christi and commodities other than grain. See *Nueces County Nav. Dist. v. Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929); *Nueces County Nav. Dist. No. 1 v. Abilene & S. Ry. Co.*, 253 I.C.C. 745 (1942); and, *Nueces County Nav. Dist. No. 1 v. Atchison T. & S. F. Ry. Co.*, 325 I.C.C. 400 (1965). The validity of the order in this last case was attacked, but upheld, in *City of Galveston v. United States*, 257 F. Supp. 243 (S.D. Tex. 1966); affirmed, per curiam, 386 U.S. 269 (1967).

Corpus Christi. Court review of each such action was sought, but with limited success.[7]

In 1977, the Frisco, as the origin line, published reduced grain rates from Oklahoma and Kansas points to Galveston and Houston but not to Corpus Christi. In response to protests, the I.C.C. instituted its Docket 36491 (Sub-No. 1) to investigate the lawfulness of that action. Disregarding the orders in Dockets 31098 and 33447, the I.C.C. allowed the unequalized rate structure to remain in effect by the decision which is Appendix B (Pet. App. 28a). Judicial review was sought.[8]

Thereupon, the Commission reopened Docket 36491 (Sub-no. 1) and issued the decision which is Appendix C (Pet. App. 66a). Judicial review of that order was sought. After petitioner's brief was filed in the Court of Appeals, the I.C.C. requested, and obtained, a remand of Docket

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[7]The first case conflicting with Dockets 31098 and 33447 was *Soybeans, Midwest to Chicago & Gulf Ports, Export*, 335 I.C.C. 883 (1970). That order was set aside in CA-3-4149-C, *Nueces County Navigation District, et al, v. United States of America*, not reported (N.D. Tex., 1973). On appeal, sub nom. *Chicago, Rock Island and Pacific Railroad Co. v. Nueces County Navigation District*, 416 U.S. 953 (1974), the judgment of the lower court was vacated and the case remanded with instruction to dismiss as moot. The second such case was *Corn and Soybeans, Midwest to Gulf Ports, For Export*, 349 I.C.C. 1 (1974). The suit attacking the validity of that order is pending in the District Court for the Northern District of Texas as CA-3-74-1253-D, and is being held in abeyance until these proceedings are concluded. Petitions for review of subsequent decisions were filed in the Fifth Circuit, but were dismissed as moot because, in each instance, the railroads extended the reduced rates to Corpus Christi after the filing for review. Hence, there is not a single court decision holding the Commission acted lawfully in disregarding its holdings and orders in Dockets 31098 and 33447.

[8]Review of I.C.C. orders is authorized by 28 U.S.C. 2321 and 28 U.S.C. 2341-2344. Jurisdiction of the Court of Appeals for the Fifth Circuit, in the four proceedings consolidated by it, was invoked under those sections.

36491 (Sub-No. 1) for further consideration. Recognizing the conflict between its decisions in Docket 36491 (Sub-No. 1) and its decisions and orders in Dockets 31098 and 33447, the I.C.C. also announced it was reopening the two earlier dockets. Purporting to be acting in a rulemaking capacity, the I.C.C. refused to receive any additional evidence or to consider the evidence introduced at the original hearings in those dockets. Instead, the I.C.C. announced it was adopting a new test, or standard, for "control" of rates; vacated its orders in Dockets 31098 and 33447; and reaffirmed its decision in Docket 36491 (Sub-No. 1). Judicial review of that consolidated decision which is Appendix D (Pet. App. 92a) was sought.

The Court of Appeals held the cases involving the three decisions in Docket 36491 (sub-No. 1) were moot and dismissed those petitions for review. The I.C.C.'s vacation orders in Dockets 31098 and 33447 were affirmed.

ARGUMENT

THE DECISION BELOW ON CARRIER RESPONSIBILITY FOR JOINT RATES CONFLICTS WITH DECISIONS OF THIS COURT.

Contrary to what the I.C.C. and the court below state, these proceedings do not merely involve the "adoption" by the Commission of a "new standard of common control". Instead, the I.C.C. has come up with a new and novel interpretation of the Interstate Commerce Act, insofar as the prohibition against unjust discrimination in rates is concerned. In so doing, it has said, in essence, a railroad is not responsible for discrimination in its joint-line rates if that carrier can show it made "an unsuccessful good faith effort to arrive at a division of revenue with the connecting carriers". 364 I.C.C. 275 (Pet. App. 102a).

Moreover, the I.C.C. has engrafted a restriction on its power and duty under the Act to remedy discrimination when no such restriction has been enacted by the Congress. Thus, it has asserted "a rate cannot be prescribed absent common control unless there is some other violation of the act.". 364 I.C.C. 277 (Pet. App. 106a). In other words, the I.C.C. is holding there is no relief available under the statute for discrimination, per se, unless there is "common control" as the I.C.C. defines it. The Commission recognizes its construction of the Act may differ from the construction this Court has given such Act, but defiantly announces "even if we have the authority, we will not prescribe a rate unless it is necesary to cure some other violation of the act". 364 I.C.C. 277. (Pet. App. 106a).

A. THE COMMON CONTROL CONCEPT

With attitudes such as these, it is small wonder the I.C.C. has transgressed virtually all the holdings of this Court on the force and effect of the Act. This Court has consistently stressed the purpose and the scope of the prohibition against discrimination. In *Houston E. & W. T. R. Co. v. United States,* 234 U.S. 342 (1914), after quoting the provisions of the statute, it was stated (234 U.S. 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn . . . . It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, ...[9]

The statutory prohibition against discrimination makes no distinction between individual and joint rates. Hence, if there is any limitation on the I.C.C.'s power and duty to

[9]See also *Louisville & N.R. Co. v. United States,* 282 U.S. 740, 749-750 (1931) and *State of New York v. United States,* 331 U.S. 284, 296 (1947).

correct discrimination in connection with joint rates, it is because the Congress has no power over such rates.[10] Congress not only has that power, but has exercised it. Sic, a carrier has the same reponsibility for the lawfulness of its joint rates as it does for its individual rates.

The I.C.C. and the court below have fallen into error by taking out of context, or misapplying, this Court's language in earlier decisions. Both rely on an isolated statement in *Central R.R. Co. of New Jersey v. United States,* 257 U.S. 247, 259 (1921) that "participation in joint rates does not make connecting carriers partners" without giving consideration to what was involved in that case and, consequently, the context in which Justice Brandeis wrote that language. In fact, they were careful to quote only a portion of the next sentence which distorts the true meaning of the statement. That sentence with the omitted portion emphasized reads (257 U.S. 259):

> They can be held jointly and severely responsible for unjust discrimination only if each carrier has participited in some way in that which causes the unjust discrimination, *as where a lower joint rate is given to one locality than to another similarly situated.* (Emphasis supplied).

Earlier, Justice Brandeis had made it clear the discrimination claimed there was not in the joint rates, but the failure to permit the privilege of creosoting in transit.[11]

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[10]While the court below held the issues in connection with Docket 36491 (Sub-No. 1) were moot, all the facts mentioned about the nature of the rates related to the rates in that docket. All rates involved in that case were joint rates. The Court of Appeals, in note 1, stated the I.C.C. had said "that Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of Southern Pacific and MoPac.". (Pet. App. 5a). The I.C.C. later corrected this error by saying (364 I.C.C. 278 n. 8) the "Frisco does not serve any of the allegedly preferred points directly.". (Pet. App. 108a).

[11]It was pointed out (257 U.S. 255) neither railroad serving the complainant plant "accords the creosoting in transit privilege at any point

It was stated the prejudice the I.C.C. had found "arises not from the existence of joint rates, but from conditions local to other railroads". (257 U.S. 258). Thus, the decision was not dealing with individual carrier responsibility when the discrimination is, or is alleged to be, in the joint rate itself.

Other cases in which Justice Brandeis delivered the opinion address that subject and make plain the limited scope of the quoted language from the *Central* case. In *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925) a major contention was that in connection with joint rates "the liability of the connecting carriers is not joint and several". (269 U.S. 231). This view was rejected by first ruling (269 U.S. 232-233):

> It is true that participation in joint rates does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. *Central R.R. Co. v. United States*, 257 U.S. 247, 259, 42 S. Ct. 80, 66 L. Ed. 217. Each connecting carrier is liable only for its own act. But the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement.

Next, it was held very specifically (269 U.S. 234):

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the in-

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on its line"; "privileges like creosoting in transit are treated as a matter local to the railroad on which the transit point is situated"; and, "although a joint through route, with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent, of, and without consulting, connecting carriers."

> fliction of this wrong is liable *in solido* like every other joint tort-feasor.[12]

In *Chicago, I. & L. Ry. Co. v. United States,* 270 U.S. 287 (1926) it was "argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality". (270 U.S. 292). This was based on the fact that some of the railroads did not directly connect with the railroad alleged to be discriminated against. The contention was overruled as follows (270 U.S. 293):

> Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue, and the order may extend to every carrier who participates in inflicting the injury. (Citing cases.) There is nothing to the contrary in *Central R.R. Co. of N.J. v. United States,* 42 S. Ct. 80, 257 U.S. 247, 66 L. Ed. 217. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination.[13]

In the above decision, *St. Louis-Southwestern Ry. Co. v. United States,* 245 U.S. 136 (1917) was cited and relied on. There the carriers contended that since their "rails do not reach Paducah, they cannot be guilty of discrimina-

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[12]In so ruling, this Court was in accord with the Commission's past practice for it was noted (269 U.S. 232) the Commission had consistently held "that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all damages sustained", and a note listed a number of such cases.

[13]In *United States v. Illinois Cent. R. Co.,* 263 U.S. 515, 520 (1924) it was also urged the Illinois Central could not be held responsible for discrimination because it could not "by its own act" cure the situation. That position was rejected.

tion against that city". (245 U.S. 144). This proposition was rejected by stating (245 U.S. 144):

> They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality, is not confined to those whose rails enter it.

The above cases firmly establish that any carrier party to a joint rate is responsible for the lawfulness of such rate, not because the two or more carriers forming the through route are "partners" nor because of any doctrine of "strict liability". Instead, each carrier is answerable for the lawfulness of the joint rate because that rate was established by it and its connections acting in concert. Congress has prohibited each and every railroad operating in interstate commerce from having either individual or joint rates which cause unjust discrimination. The I.C.C. is not empowered to excuse any carrier from that ban. Neither can it confer immunity by holding a carrier has no responsiblity for its joint rate, if it cannot persuade its connecting carrier to join in changing that rate. This is so, for this Court has clearly held that under the Act each carrier party to a joint rate is fully and legally responsible for the lawfulness of that joint rate.

Although the I.C.C. and the Court of Appeals cite *Texas & P. Ry. Co. v. United States,* 289 U.S. 627 (1933), that case does not warrant the action the I.C.C. has taken, much less require it. The principal holding in that case was that ports were not "localities" and, therefore, were not protected from discrimination by the Act. 289 U.S. 644.

While that holding effectively nullified the I.C.C. orders under attack there, Justice Roberts discussed other matters.

In discussing discrimination, the "classical case" of a "single carrier serving two points approximately equidistant from a common origin" and charging "unequal rates for the two hauls" was first mentioned. 289 U.S. 648. Then, it was stated (289 U.S. 648):

> The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to both points, and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same. (Footnotes omitted).

That is precisely the type situation in issue here. For example, in Docket 36491 (Sub-No. 1) the Frisco is the origin carrier on wheat shipped from Oklahoma and Kansas, regardless of whether the wheat is consigned to Corpus Christi, on the one hand, or Galveston and Houston, on the other hand. On shipments to Corpus Christi the delivering carrier is either the Missouri Pacific or Southern Pacific, while on shipments to Galveston or Houston the delivering carrier is either the Fort Worth & Denver or the Missouri-Kansas-Texas. 364 I.C.C. 278 (Pet. App. 108a). Hence, the origin carrier is the same, even though the delivering carriers are different. A similar situation exists in connection with the rates involved in Dockets 31098 and 33447, and in some instances even the delivering carrier could be the same because the Missouri Pacific and Southern Pacific serve Galveston and Houston, as well as Corpus Christi.

The language on which the I.C.C. relies is (289 U.S. 650):

> A carrier or group of carriers must be the common source of the discrimination — must effectively participate in both rates, if an order for

> correction of the disparity is to run against it or them. Where an order is made under section 3 an alternative must be afforded. (Footnote omitted).

It will be observed that nothing in that holding refers to a carrier, or a group of carriers, having "control" over the rates, much less "actual control". Instead, all that is required is for a carrier, or a group of carriers, to "effectively participate in both rates". It is obvious that when an origin carrier, for instance, like the Frisco, establishes a joint rate from one of its stations in Oklahoma or Kansas in connection with the Missouri Pacific to Corpus Christi, and another in connection with the Fort Worth & Denver to Galveston or Houston, there is effective participation by the Frisco in both rates.

In view of the last sentence of the language quoted next above, we point out that it was subject to a footnote reference, which states (289 U.S. 650 n. 39) that an alternative is not required in connection with an order issued pursuant to Section 15(1) of the Act. (Formerly 49 U.S.C. 15(1), now 49 U.S.C. 10704(a)(1)).

Regardless of the scope of the decision in *Texas & Pacific,* supra, a significant fact is that Congress was evidently not pleased with that decision. As pointed out in *State of New York v. United States,* 331 U.S. 284, 296 (1947), Congress amended then Section 3(1) of the Act so as to extend the ban against its discrimination to include a "port, port district, gateway, transit point". This amendment eliminated the basis for the principal matter decided in *Texas & Pacific.*

Shortly thereafter the I.C.C. had occasion to rule on the force and effect of that amendment in *Albany Port District Comm. v. Ahnapee & W. Ry. Co.,* 219 I.C.C. 151 (1936). In that case it was alleged, among other things, that the rates between the port of Albany and the interior on export and import traffic were unduly prejudicial to

Albany and unduly prejudicial to other north Atlantic ports. (219 I.C.C. 152). The defendant railroads argued they did not, and could not, "unduly prejudice the port of Albany, the traffic through that port, or shippers of such traffic, because no one carrier or group of carriers could remedy the situation under an alternative order issued under Section 3 of the act.". 219 I.C.C. 171. In so contending, the carriers relied on the holding in *Texas & Pacific,* supra, about "a carrier or group of carriers must be a common source of the discrimination". Although the I.C.C. now says that in the Albany case it "presumed" there was "common control", this is not correct. The facts were discussed and it was found there was "a group of carriers which is the common souce of the alleged discrimination and which effectively participate in both sets of rates." 219 I.C.C. 172. Moreover, the legislative history of the amendment which added ports and port districts to then Section 3(1) was studied and that history was stated to indicate "that the amendment was intended to cover situations such as the one here under consideration.". 219 I.C.C. 173.

The approach, or procedure, of the *Albany* case has been followed by the I.C.C. and upheld by the courts until these proceedings.[14] For instance, in Docket 31098, supra, it was held (291 I.C.C. 470):

> The evidence clearly shows that the Missouri Pacific Lines and the Texas & New Orleans, together with the other carriers which serve the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively control the rates to all such ports.

[14]Two examples are *Hillsborough County Port Authority v. Ahnapee & W. Ry. Co.*, 313 I.C.C. 691 (1961), aff. per curiam sub nom. *Alabama, T. & N. R. Co. v. United States,* 207 F. Supp. 638 (S.D. Ala. 1962) and, *Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co.*, 319 I.C.C. 54 (1963); 322 I.C.C. 529 (1964) aff. sub nom. *Atchison, Topeka & Santa Fe Railway Co. v. United States,* 231 F. Supp. 422 (N.D. Ill. 1964).

It is, we submit, bordering on sophistry to assert that in that case the I.C.C. "presumed" common control existed. Patently if the "evidence clearly" showed the described carriers "directly and effectively" controlled the rates to the Texas ports, there was no presumption, but instead a clear finding of fact based on evidence. In fact, petitioner submits the I.C.C. rhetoric about "presumed control" and "actual control" and similar expressions is nothing but a smoke screen trying to obscure the fact the I.C.C. is reconstruing the Act so as to relieve a carrier from responsibility for a discriminatory joint rate.

In this connection, neither the I.C.C. nor the Court of Appeals gave proper weight to this Court's holdings in *State of New York v. United States,* 331 U.S. 284 (1947), and *Ayrshire Collieries Corporation v. United States,* 335 U.S. 573 (1948). In *New York* the attack was on an order of the I.C.C. which had condemned certain intraterritorial and interterritorial rates as being discriminatory. A principal contention by the carriers was that the holdings of *Texas & Pacific,* supra, about common source of discrimination precluded the I.C.C. from making the order. This Court found no merit to that contention and ruled (331 U.S. 342-343):

> If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

Earlier it had been pointed out (331 U.S. 296-297) that § 3(1) was amended in 1935 to include "port, port district, gateway, transit point" and in 1940 to include "region, district, territory". Thus, ports and port districts have exactly the same status as regions and territories. Ergo, if Congress empowered the I.C.C. to prevent discrimination

against regions and territories, even though the rates involved in the rate relationship are not controlled by the same carriers, then Congress has done the same for ports and port districts. As it is the obligation of the I.C.C. to enforce the Act (49 U.S.C. 12(1)(a), now codified as 49 U.S.C. 10321(a)), it is crystal clear the Commission is shirking its obligations when it says it will not strike down discriminatory rates unless it can find "actual control", as it defines it.

As *New York* refers to the I.C.C. acting under § 15(1) (49 U.S.C. 15(1), now condified as 49 U.S.C. 10704(a)(1)), we point out that both Dockets 31098 and 33447 arose from the filing of complaints and these were handled under § 15(1). The orders in those cases were issued under that section. To illustrate, observe the order in Docket 31098. Appendix E. (Pet. App. 110a). It (a) found the rates to Corpus Christi unduly prejudicial to Corpus Christi, and unduly preferential to Galveston and Houston "to the extent that said rates exceed or may exceed the rates on like traffic to Galveston and Houston"; (b) required the carriers to cease and desist on or before April 29, 1954, and thereafter abstain from the undue prejudice found in the preceding paragraph; and, (c) ordered the carriers to establish on or before April 29, 1954, and thereafter maintain rates which would prevent and avoid the undue prejudice described in the first paragraph of the order. This is almost a literal tracking of the § 15(1) provisions. It is not a § 3(1) order, but one fixing the maximum rates to Corpus Christi as the corresponding rates to Galveston and Houston. See *St. Louis Southwestern Ry. Co. v. United States,* 245 U.S. 136, 145. The same is true of the order in Docket 33447.

In *Ayrshire* some of the main contentions were summarized thusly (335 U.S. 593):

> Appellants argue that the Commission acted beyond its authority because it did not afford the

> carriers alternative methods of removing the discrimination which was found to exist. See *Texas & Pacific R. Co. v. United States*, 289 U.S. 627. And Milwaukee argues that the Commission was without power to direct it to cease from granting the undue preference found to exist between its single-line rate and the higher joint-line rates, since it had no control over the latter.

This Court disagreed (335 U.S. 594):

> Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate once it finds, inter alia, that any rate charged is unjustly discriminating or unduly preferential or prejudicial. The Commission in the present case has exercised that power. It has prescribed approved rates. They are rates which in the Commission's judgment will eliminate the unjust discrimination and undue preference found to exist in this rate structure. Hence the question whether Milwaukee effectively controlled the higher joint-line rates is irrelevant here.

New York and *Ayrshire* make it very plain the I.C.C. is in error when it holds it cannot correct a discriminatory rate situation without finding common control by one or more carriers. It is even more in error when it says it cannot, or will not, strike down rates which are unjustly discriminatory unless it finds such rates also contravene some other prohibition of the Act. Congress has declared discriminatory rates unlawful and has designated the Commission as the agency to enforce that ban. The I.C.C. cannot lawfully refuse to carry out the mandate given to it by Congress.

B. FAILURE TO AGREE ON DIVISIONS

One of the most shocking features of the I.C.C.'s decision is the holding that a carrier can avoid liability for discriminatory rates by showing that it and its connecting line, or lines, have been unable to agree on how to divide the revenue received from a joint rate. This is contrary to virtually everything this Court has held on the subject of divisions, and is a complete reversal of the Commission's prior position on the matter.

There is nothing, of course, in the Act which excuses a carrier from its obligations thereunder if it and its connection(s) disagree on how much of the through rate each is to receive. The I.C.C. exceeds its power and authority when it writes such an exemption into the statute. As succinctly ruled in *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, supra, (269 U.S. 234):

> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

While the statement is made about reasonableness of the rate, the same is true insofar as the discriminatory nature of the rate is concerned. Itemizing, the shipper's legitimate concern is that the joint rate as whole is not unjustly discriminatory, not how much of the revenue goes to each carrier. Under the statutes, the shipper cannot be made to suffer from discrimination because the carriers cannot, or will not, agree on divisions. This is confirmed by *Texas & Pacific*, supra, where it was vouched (289 U.S. 649):

> If one or more of the railroads whose lines make up the through route should refuse, upon an order to equalize rates, to afford one of the others a proper division of the rate, the latter may obtain redress from the Commission under section 15(6) (49 USCA § 15(6)).

A similar holding in *St. Louis Southwestern Ry. Co. v. United States,* supra, was (245 U.S. 143):

> If these complaining carriers cannot reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the Act to Regulate Commerce (Comp. St. 1916, § 8583), apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

Up until these proceedings, the holdings of the I.C.C. were in the same vein as a few typical examples demonstrate. In *Ohio Valley Coal Operators Asso. v. I.C.R.R. Co.,* 53 I.C.C. 148, 152 (1919), it was ruled:

> The Illinois Central pleads that the adjustment is controlled by the lines beyond the crossings and that it cannot afford to reduce its divisions on the longer hauls to the more southern crossings to the basis of the divisions to East St. Louis. In the past we have consistently held that the inability of carriers to agree upon divisions is no justification for maintaining unduly prejudicial rates, a remedy being provided by section 15 of the commerce act.

Rate Cancellation from Indiana to Ohio, 66 I.C.C. 449, 451 (1922) held:

> The shipping public must not be made to suffer because of a disagreement between carriers over divisions. The act prescribes the method for adjusting such controversies.

In *Boston Wool Trade Association v. A. & K. Ry. Co.,* 142 I.C.C. 39, 41-42, (1928) it was asserted:

> We have repeatedly said that shippers are not interested in the matter of divisions and are not to be deprived of reasonable rates because carriers are unable to agree as to divisions.

By injecting the offer of divisions as a test of whether a carrier has control of a rate, or rates, the I.C.C. not only makes the public have an interest in divisions, but makes the public's rights under the Act dependent upon connecting carriers being able, or willing, to agree on divisions. This is true even though there is no conceivable way anyone like petitioner can make an agreement regarding divisions for a carrier or, for that matter, even influence a carrier on what divisions it will agree upon. Petitioner submits that under the Act and the decisions of this Court applying it, the I.C.C. cannot validly allow a carrier to establish or maintain unduly discriminatory rates by merely showing such carrier has made a good faith offer of divisions on proposed new rates which offer was unacceptable to the other carrier party to the joint rate.

C. THE SCOPE OF REVIEW

It is indisputable the I.C.C. in these proceedings has set out to, and has, reinterpreted the anti-discrimination provisions of the Act and the decisions of this Court applying the Act. In other words, the I.C.C. has tried to define the duties and obligations of a carrier under the Act with particular reference to that portion of the statute prohibiting discrimination in joint-lines rates. In so doing, it also interprets the Act to determine the scope and extent of its power and authority to condemn joint-line rates as being unduly discriminatory. These are questions of law, not of fact, nor of policy. References to "standards", "tests", "presumption of control", "actual control", and the like cannot be allowed to obscure the true nature of what the I.C.C. has done.

The Commission has no special competence in statutory construction, nor in interpreting the decisions of this Court. Nevertheless, the Court of Appeals felt it was only authorized to review the I.C.C. decision in a limited, or "narrow", way. The Court of Appeals was wrong, and this

Court should not feel any such constraint. This is borne out by numerous decisions of this Court.

While the I.C.C. can interpret the Act, it cannot, by interpretation, change or modify the Act. Neither does its interpretation have any sacrosanct status; it may be persuasive, but it is not binding on a court reviewing Commission action. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Further, as stated in *Securities and Exchange Com. v. Chenery Corp.*, 317 U.S. 80, 94 (1943):

> An order may not stand if the agency has misconceived the law.

Moreover, it is fundamental an agency cannot, by interpretation, usurp the function of Congress or of the courts in determining the scope of the law under which the agency operates, or as is said in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946):

> An agency may not finally decide the limits of its statutory power. That is a judicial function.,

If anything, more recent decisions restrict the "deference" a reviewing court should give to agency decisions especially those involving statutory construction. *American Ship Building Company v.. N.L.R.B.*, 380 U.S. 300, 318 (1965) held:

> We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.

National Labor Relations Board v. Brown, 380 U.S. 278, 291-292 (1965) ruled:

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

As the I.C.C. has changed its interpetation of the Act from what it adopted when ports and port districts were included in the Act, we direct attention to the following from *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979):

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congresional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry.

D. THE MOOTNESS QUESTION

The Court of Appeals erred in holding the proceedings in its docket nos. 78-1348, 79-1816, and 80-1842 were moot because the I.C.C. decisions in those cases fall within the principles of *Southern Pac. Terminal Co. v. Interstate Commerce Comm.*, 219 U.S. 498, 513 (1911), and

cases following and expanding that decision.[15] The court below then compounded this error by dismissing the petitions for review instead of remanding those proceedings to the I.C.C. with directions to dismiss.[16] If the proceedings in Docket 36491 (Sub-No. 1) are truly moot, the holding that the Frisco does not have control of the wheat rates from its origins in Kansas and Oklahoma to Corpus Christi should be vacated. Ironically, if those proceedings were moot, there was no justification for the I.C.C. to reopen Docket Nos. 31098 and 33447 and vacate the orders therein.

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[15] *Soulthern P. Co. v. Interstate Commerce Comm.*, 219 U.S. 433 (1911); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *Federal Trade Commission v. Goodyear Tire & R. Co.*, 304 U.S. 257, 260 (1938); *National Labor Relations Board v. Pennsylvania G. Lines*, 303 U.S. 261, 271 (1938); and, *Walling v. Helmerich & Payne*, 323 U.S. 37, 42-43 (1944).

[16] *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); and, *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979).

CONCLUSION

The banning of unduly discriminatory rates is a keystone provision of the Act. As this is the first court review of the I.C.C.'s reinterpretation of this provision, these proceedings will undoubtedly be considered a "landmark" decision in the field of transportation law. Because of the importance of the issues, they should be settled by this Court, not a Court of Appeals. For that and the other reasons stated heretofore, certiorari should be granted.

Respectfully submitted,

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